

**B. Do The Underlying Facts Of Cox's Claims Justify Dismissal
Of The Complaint As To This Company?**

1. Stipulated facts

39. Complainants cannot stipulate to any facts for the reasons set forth below.

2. Disputed facts

a) Complainants

40. Complainants believe that this question as posed is too narrow and is not the appropriate question for the FCC to consider. The facts associated with Cox's claims are just one part of why its is a proper party to this suit. Complainants believe the appropriate question for the FCC to consider is "Whether Cox is a proper party." Complainants address this question in III.A. above. [EAI cannot stipulate to these statements for the reasons cited above.]

b) EAI

41. EAI has not conducted a test inspection or a full safety inspection with respect to Cox's plant. EAI has engaged USS to conduct pre-construction engineering/make-ready and post-construction inspections with respect to Cox's system upgrades.³⁷ [Complainants cannot stipulate to any facts for the reasons set forth above.]

³⁷ Resp. at ¶ 73; Harrell Decl. Resp. Ex. 7 at ¶¶ 17-19; Wagoner Decl. Resp. Ex. 18 at ¶ 52; Reply at p. 97.

3. Stipulated law

42. Complainants cannot stipulate to any law for the reasons set forth above.

4. Disputed law

a) Complainants

43. Complainants do not offer disputed points of law for the reasons set forth above.

b) EAI

44. As a general principle, joinder requires a common set of facts and circumstances.³⁸ The underlying facts with respect to Cox are so different that it is improper to include them in this complaint.³⁹ Cox has not been subject to the alleged behavior for which the other Complainants seek relief, and accordingly its claims are speculative and unripe, and unnecessarily complicate an already complex proceeding.⁴⁰ Joinder is intended to streamline the complaint process and prevent duplicative proceedings where there are common issues of law and fact. Neither are present here with respect to Cox, and accordingly the complaint should be dismissed as to Cox. [Complainants cannot stipulate to this section for the reasons set forth above]

³⁸ See, e.g., 47 C.F.R. § 1.723; See also, *In re Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Television Poles*, 2 FCC Rcd 4387, at ¶ 79 (1987) (suggesting the inclusion of suits by cable associations mirrors the joint complaint provision to assist in situations where "one set of data applies to several CATV operators"); *Texas Cable & Tel. Ass'n v. GTE Southwest*, 17 FCC Rcd. 6261, at ¶ 12 (2002).

³⁹ Harrell Decl. Resp. Ex. 8 at ¶¶ 16-21.

⁴⁰ Resp. 73-76.

IV. ENGINEERING STANDARDS

A. Were Complainants Appropriately Held To The Engineering Standards in the Pole Attachment Agreements For This Inspection?

1. Stipulated facts

45. None.

2. Disputed facts

a) Complainants

46. In accordance with federal law and the parties past practices, it is neither just nor reasonable for EAI to require Complainants to comply strictly with the engineering standards in the pole attachment agreements as a condition of access. Further, in connection with the inspection at issue, it is unjust and unreasonable for EAI to disregard its own practice of granting oral and informal waivers of the heightened standards set forth in the agreements. [EAI cannot stipulate to these statements as they are Complainants' conclusions of law. EAI has always required adherence to its contract standards.⁴¹ In any event, EAI would not, and could not, have endorsed a condition that did not even comply with the NESC.⁴² 95% of the violations cited are NESC violations, the standard that Complainants argue should apply.⁴³]

⁴¹ Bettis Decl. Resp. Ex. 3 at ¶ 8; Neumeier Decl. Resp. Ex. 14 at ¶ 8; Harrell Decl. Resp. Ex. 8 at ¶¶ 7, 11-15, Attachments A, C; Kelley Decl. Resp. Ex. 11 at ¶¶ 3-5; Willems Decl. Resp. Ex. 10 at ¶ 8.

⁴² Ark. Code. Ann. § 13-17-236.

⁴³ Complaint at 84-86 (list items m, o); Arnett Decl. Resp. Ex. 1 at ¶ 23; Tabor Decl. Resp. Ex. 17 at ¶ 20; Buie Decl. Resp. Ex. 4 at ¶¶ 29, 30, 48, 60, 86.

47. EAI's standards that exceed the NESC and/or industry practices (a) were not in earlier agreements with EAI, under which the vast majority of the Complainants' Service Area plant was constructed, or (b) existed in the agreements, but EAI did not require the cable operators to adhere to them.⁴⁴ [EAI cannot stipulate to this statement, as Complainants have not previously argued that prior agreements did not contain these provisions, nor do they dispute that the appended agreements, Complaint Ex. 2A-2D, are currently in effect. No prior contracts are in the record, save the two offered by EAI which illustrate that the standards have not changed.⁴⁵ These two prior contracts for Riverside Cable, Comcast's predecessor, dated 1980 and 1986, contain the same schematic drawings present in the agreements appended to the Complaint, the same bonding requirements, the same requirement for written permission to attach to anchors, and the same inspection rights for the utility.⁴⁶ EAI also contends that the Cable Operators have always been required to adhere to these standards.⁴⁷]

48. The EAI Pole Agreements contain construction standards that exceed NESC requirements and standard industry practices. The NESC

⁴⁴ Declaration of Marc Billingsley (Compl. Exh. 6); Declaration of Bennett Hooks (Compl. Exh. 4); Declaration of Jeff Gould (Compl. Exh. 3); Declaration of Charlotte Dial (Compl. Exh. 5).

⁴⁵ Resp. Ex. 72.

⁴⁶ *Compare*, Resp. Ex. 72 at attachments 1-4. Articles 2.3, 2.4(D), 2.7, V, with Complaint Ex. 2A-2D, at attachments 1-4, 2.3., 2.4(D), 2.7, V.

⁴⁷ Bettis Decl. Resp. Ex. 3 at ¶ 8; Neumeier Decl. Resp. Ex. 14 at ¶ 8; Willems Decl. Resp. Ex. 20 at ¶ 8; Harrell Decl. Resp. Ex. 8 at ¶ 7.

explains that heightened standards do not increase safety.⁴⁸ EAI has failed to justify its heightened standards by showing how they increase reliability or promote generally applicable engineering purposes,⁴⁹ as is required by Section 224(f)(2). [This is a conclusion of law, and EAI cannot stipulate to this statement. EAI contends that its standards are not in "excess" of the NESC and/or industry standards as characterized by Complainants.⁵⁰ Complainants are also inappropriately attempting to import the terms of Section 224(f), relating solely to denials of access, into the general language of Section 224(b) that states that rate, terms and conditions for pole attachments must be just and reasonable. As acknowledged by the FCC in the *Local Competition Order*, engineering standards may be based on a variety of considerations, including business, efficiency, and cost considerations, and are not limited to issues related to safety, reliability or generally applicable engineering issues.⁵¹]

49. Complainants vigorously object to Entergy's introduction of its new legal theory in this document, that its terms and conditions of attachment need not comply with the principles set forth in Section 224(f). Complainants will provide its briefing to the Commission on this legal issue if the Commission so requests. Since Entergy only presented this theory to

⁴⁸ Harrelson Reply Report ¶¶ 49-50.

⁴⁹ (See Response Sec. V.B.); Harrelson Report pp. 4-5, 11,

⁵⁰ Response ¶ 86; Buie Decl. Resp. Ex 4 at ¶¶ 25-28, 63, 84; Dagenhart Decl. Resp. Ex. 6 at ¶ 12; Jackson Decl. Resp. Ex. 10 at ¶¶ 5-7; Letter from UTC/EEI to W. Darling, Resp. Ex. 81.

⁵¹ Compare, 47 U.S.C. §§ 224(b), (f); *Local Competition Order* at ¶ 1148.

Complainants one business day before filing date for the Joint Statement, Complainants are unable to brief it here, aside from stating that Entergy's position is not supported by law.⁵² [EAI cannot stipulate to this statement. EAI has consistently argued that it is not limited in its engineering determinations to reasons of capacity, safety, reliability or generally applicable engineering standards.⁵³]

50. EAI's construction crews do not comply strictly with the engineering standards with which EAI requires Complainants to comply strictly as a condition of access.⁵⁴ Rather, EAI field personnel, with whom Complainants have a long history in the field, often grant oral approvals, waivers and variations.⁵⁵ [EAI cannot stipulate to this statement. EAI holds itself to the same standards to which it holds complainants.⁵⁶ EAI has not given Complainants approval to violate the provisions of the contract or the NESC.⁵⁷]

⁵² See, e.g., *Cavalier*, ¶ 4.

⁵³ See, e.g., Response ¶¶ 83-88.

⁵⁴ Harrelson Report pp. 3, 11-12, 20, 24 (*See* Complaint Sec. VIII.C). Harrelson Reply Report p. 38, 40, 44-62; Gould Reply Decl. ¶¶ 22-24; Billingsley Decl. ¶¶ 23-24, 26-27, 46.

⁵⁵ Harrelson Report, p. 24; Billingsley Reply Decl., ¶ 40; Hooks Reply Decl., ¶ 24; Allen Reply Decl., ¶ 19. (*See* Reply Sec. III.D.2).

⁵⁶ Lovell Decl. Resp. Ex. 13 at ¶¶ 4.

⁵⁷ Bettis Decl. Resp. Ex. 3 at ¶¶ 8, 24; Harrell Decl. Resp. Ex. 8 at ¶¶ 7, 11-15, Harrell Attachment A (Letter from Davies to Bettis, Mar. 24, 1989); Harrell Attachment C (Memorandum and letter to cable operators from C. Boyd, May 5 1989); Kelley Decl. Resp. Ex. 11 at ¶¶ 3-5; Willems Decl. Resp. Ex. 20 at ¶ 8; Neumeier Decl. Resp. Ex. 14 at ¶ 8.

51. The standards used to identify safety violations vary significantly both on a day to day basis among EAI personnel and also between EAI and USS.⁵⁸ Exacerbating the problem is the fact EAI does not have a clear, consistent set of standards.⁵⁹ In fact, despite Complainants repeated requests for a set of standards that a) apply to EAI's outside plant construction and b) to USS' inspection, EAI has not produced any.⁶⁰ [EAI cannot stipulate to this statement. EAI contends that its standards are clearly delineated in the pole attachment agreements, and have not changed since their inception.⁶¹ USS used the contract standard to evaluate Complainants' plant.⁶² EAI also provided additional guidance to Comcast by letter dated Sept. 24, 2002, at Comcast's request, and illustrated in Exhibit 2 to the Complaint.⁶³]

b) EAI

52. EAI's engineering standards are reasonable, clear and well defined, and the Complainants' facilities were properly evaluated by USS against the engineering standards of the pole attachment agreements.⁶⁴ Where a judgment call was required as to whether a standard was met (*i.e.*, whether

⁵⁸ Allen Reply Decl. ¶ 15; Hooks Reply Decl. ¶ 16; Dunlap Reply Decl. ¶¶ 3-6; Gould Reply Decl. ¶ 17-19; Billingsley Reply Decl. ¶¶ 23-24.

⁵⁹ Dunlap Reply Decl. ¶¶ 5-7; Allen Reply Decl. ¶¶ 18-19; Hooks Reply Decl. ¶¶ 16-19; Gould Reply Decl. ¶¶ 17-21, 30; Billingsley Decl. ¶¶ 23-24 (Reply Sec. V.C.).

⁶⁰ Reply p. 56; Billingsley Reply Decl. ¶ 57; Harrelson Reply Report, ¶¶ 69-70.

⁶¹ Complaint Ex. 2A-2D; Resp. Ex. 72.

⁶² Arnett Decl. Resp. Ex. 1 at ¶ 23.

⁶³ Complaint Ex. 2 Letter from B. Welch to J. Randle (Sept. 24, 2002).

⁶⁴ Arnett Decl. Resp. Ex. 1 at ¶ 23.

an area was subject to pedestrian traffic and required a guy marker) and where reasonable professionals may differ as to the application of a standard, EAI and USS made a conservative assessment and expressed a willingness to hear Complainants' disagreements.⁶⁵ [Complainants cannot stipulate to this paragraph. Complainants disagree that EAI or USS ever left any issues to Complainants consideration. USS and EAI have made clear that all judgment calls were to be made by either USS or EAI.⁶⁶] USS recorded 42,789 violations of the contract standards for Comcast, 7,259 violations for Alliance, and 1,433 violations for WEHCO.⁶⁷ [Complainants dispute the accuracy of these violations. Complainants do not agree that all of the "violations" Entergy recorded are true violations.⁶⁸]

53. EAI has never given permission for Complainants to deviate from its contractual engineering standards, and has never given written consent to attach to its existing anchors.⁶⁹ [Complainants cannot stipulate to this

⁶⁵ Response at ¶ 52, n 117; Wagoner Decl. Resp. Ex. 18 at ¶ 47; Inman Decl. Resp. Ex. 9 at ¶¶ 35-36; Tabor Decl. Resp. Ex. 17 at ¶ 19.

⁶⁶ Gould Decl. ¶¶ 37-38; Harrelson Reply Report ¶¶ 37-45; Billingsley Reply Decl. ¶¶ 32-38.

⁶⁷ Arnett Decl. Resp. Ex. 1 at ¶¶ 30, 36, 37, Attachment B.

⁶⁸ Harrelson Reply Report ¶¶ 55-63.

⁶⁹ Bettis Decl. Resp. Ex. 3 at ¶¶ 8, 24; Harrell Decl. Resp. Ex. 8 at ¶¶ 7, 11-15, Harrell Attachment A (Letter from Davies to Bettis, Mar. 24, 1989); Harrell Attachment C (Memorandum and letter to cable operators from C. Boyd, May 5 1989); Kelley Decl. Resp. Ex. 11 at ¶ 3-5; Willems Decl. Resp. Ex. 20 at ¶ 8; Neumeier Decl. Resp. Ex. 14 at ¶ 8; Lovell Decl. Resp. Ex. 13 at ¶ 6.

fact.⁷⁰] Even assuming, *arguendo*, that EAI gave permission to deviate from the enumerated contract standards or to employ exceptions to the NESC, in no instance would EAI have permitted the Cable Operators to attach their facilities in violation of the NESC nor would it have authority to permit such attachments under Arkansas law, which specifies the NESC as a minimum.⁷¹ [Complainants cannot stipulate to this fact because EAI does routinely grant exceptions to the NESC where convenient to EAI.⁷²] Complainants do not claim that they had permission to install or maintain their facilities at a standard less stringent than the NESC, nor do they seek permission to do so now. [Complainants will stipulate that they do not seek permission to install facilities that do not meet the NESC. Complainants do not stipulate to the remainder of this sentence because EAI permits exceptions to the NESC where convenient to EAI.⁷³] The vast majority of the conditions cited by USS do not even meet the NESC standards that Complainants seek to have the FCC impose.⁷⁴ Between 85 and 97% of all violations cited with respect to facilities for Comcast, Alliance and WEHCO constitute a violation of the NESC even if the FCC applied the standards in a manner Complainants

⁷⁰ Harrelson Report pp. 21-22; Billingsley Decl. ¶ 21; Hooks Decl. ¶ 23; Gould Decl. ¶ 17.

⁷¹ Ark. Code Ann. § 23-17-236.

⁷² Harrelson Decl. pp. 23-24; Dunlap Reply Decl. ¶ 5; Gould Reply Decl. ¶ 18.

⁷³ Harrelson Decl. pp. 23-24; Dunlap Reply Decl. ¶ 5; Gould Reply Decl. ¶ 18.

⁷⁴ Arnett Decl. Resp. Ex. 1 at ¶ 23; Tabor Decl. Resp. Ex. 17 at ¶ 20; Buie Decl. Resp. Ex. 4 at ¶¶ 29, 30, 48, 60, 86.

wish.⁷⁵ [Complainants cannot stipulate to these facts because they disagree with Entergy's conclusion.⁷⁶]

3. Stipulated points of law

54. Utilities have the right to inspect their poles to ensure they are compliant with applicable safety standards.⁷⁷

4. Disputed points of law

a) Complainants

55. It is unjust and unreasonable for EAI to hold Complainants to strict compliance with the Pole Attachment Agreements where EAI's past practice has not previously enforced strict compliance.⁷⁸ [EAI cannot stipulate to any paragraph in this section as they are Complainants' conclusions of law, and for the reasons cited below.]

56. It is unjust and unreasonable for EAI to penalize Complainants for conduct consistent with the parties prior practices.⁷⁹

57. It is wholly unreasonable for EAI now to claim that Complainants' conduct, consistent with the parties' prior practices, are evidence of wrong

⁷⁵ Arnett Decl. Resp. Ex. 1 at Attachment B.

⁷⁶ Harrelson Reply Report ¶¶ 55-63.

⁷⁷ *Cable Tel. Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16,333, at 15 (2003).

⁷⁸ *See Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd 11450 (Cab. Serv. Bur. 2000), *aff'd on reconsideration*, 17 FCC Rcd 6268 (2002), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

⁷⁹ *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd 11450 (Cab. Serv. Bur. 2000), *aff'd on reconsideration*, 17 FCC Rcd 6268 (2002), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

doing or otherwise justify conducting an audit or survey at Complainants' expense.⁸⁰

b) EAI

58. Application of the engineering standards in the Parties' pole attachment agreements was just and reasonable. Complainants' reliance on *Public Service Co. of Colorado* is also misplaced, as this case related to counting methodologies for which the Bureau determined the attachers had no prior notice. The Cable Operators have been on notice of these provisions since the inception of their relationships with EAI, and have not provided any documentation as to permitted deviations.⁸¹ [Complainants cannot stipulate to this paragraph. Entergy field personnel, with whom Complainants have a long history in the field, often grant oral approvals, waivers and variations to Entergy's standards that exceed the NESC.⁸²]

B. Are EAI's Engineering Standards, As Delineated In The Pole Attachment Agreements, Reasonable?

1. Stipulated Facts

59. EAI's engineering specifications under the pole attachment agreements require:

⁸⁰ *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd 11450 (Cab. Serv. Bur. 2000), *aff'd on reconsideration*, 17 FCC Rcd 6268 (2002), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003).

⁸¹ Response ¶ 85; Pole attachment agreements, Complaint Ex. 2A-2D; Bettis Decl. Resp. Ex. 3 at ¶ 8; Neumeier Decl. Resp. Ex. 14 at ¶ 8; Welch Decl. Resp. Ex. 19 at ¶ 6; Willems Decl. Resp. Ex. 20 at ¶ 8.

⁸² Billingsley Reply Decl., ¶ 40; Hooks Reply Decl., ¶ 24; Allen Reply Decl., ¶ 19. (See Reply Sec. III.D.2)

- 12 inches of separation between communications cables at the pole;
- 40 inches of separation between the highest communications cable and the electric neutral at the pole;
- bonding on each pole where there is a vertical ground;
- shared use of anchors only with EAI's written permission;
- 9 inches of separation at mid-span between communications cables; and
- 30 inches of separation at mid-span between the highest communications cable and the electric neutral.

60. Guy markers are required under the NESC in areas "exposed to pedestrian traffic."⁸³

2. Disputed facts

a) Complainants

61. EAI's construction standards that exceed the requirements of the NESC are unjust and unreasonable because EAI has failed to demonstrate that they are for reasons of safety, reliability or generally applicable engineering standards. [EAI cannot stipulate to this as it is Complainants' legal conclusion and not a fact. Moreover, engineering standards are not limited by the criteria for denials of access specified in Section 224(f); rather, these standards (if subject to FCC jurisdiction at all) must only be just and reasonable under 224(b). As stated elsewhere, standards may be just and reasonable without relating to capacity, safety, reliability, or generally

⁸³ Resp. at ¶ 107; Wagoner Decl Resp. Ex. 18 at ¶ 47; Tabor Decl. Resp. Ex. 17 at ¶ 19.

accepted engineering practices.⁸⁴ EAI has also fully justified its standards on safety, reliability, generally applicable engineering, efficiency, business, local conditions and other appropriate reasons.^{85]}

62. The NESC explains that heightened standards do not increase safety.⁸⁶ [EAI cannot stipulate to this statement for the above reasons.]

63. EAI has failed to justify its heightened standards by showing how they increase reliability or promote generally applicable engineering purposes.⁸⁷ [EAI cannot stipulate to this statement for the above reasons.]

64. Complainants believe that under certain circumstances, EAI's standards, which exceed the NESC, can be reasonable. [EAI cannot stipulate to this statement in that EAI asserts its standards are just and reasonable, and they do not "exceed" the NESC in the manner portrayed by Complainants.^{88]}

65. Those circumstances include: 1) during the design and installation phases of pole and electric facility construction, EAI must provide adequate space on the poles for its facilities and other attachers.⁸⁹ 2) EAI must install its wires and equipment consistent with the plant design and space

⁸⁴ *Local Competition Order* at ¶¶ 1143-1150.

⁸⁵ Response ¶¶ 90-113; Buie Decl. Resp. Ex. 4 at 20, 25-28, 55-56, 63, 65, 70-82; Dagenhart Decl. Resp. Ex. 6 at ¶¶ 11-14; *See also, Newport News* at ¶ 15.

⁸⁶ Harrelson Reply Report ¶¶ 49-50.

⁸⁷ *See* Response Sec. V.B.

⁸⁸ Buie Decl. Resp. Ex. 4 at ¶¶ 25-28, 63, 84; Dagenhart Decl. Resp. Ex. 6 at ¶¶ 14-15.

⁸⁹ Harrelson Reply Report, ¶¶ 48-49.

allocations.⁹⁰ 3) Other attachers install their equipment consistent with the plant design and space allocations.⁹¹ However, EAI's practices in the field, regardless of what it claims its standards are or have been, were and are that it does not follow these heightened standards or require any attachers other than Complainants to follow them.⁹² [EAI cannot stipulate to these statements as it is EAI's position that its standards are just and reasonable in the current circumstances, and that it applies the same criteria to all attachers, including itself.⁹³]

66. Complainants are willing to follow many of EAI's heightened standards on a going forward basis and have made many changes such as removing guys from anchors (and transferring them to new ones) and bonding to each poles.⁹⁴ [EAI cannot stipulate to this statement at present as it relates to future behavior, and because Complainants have not reported any corrections to plant in more than a year.⁹⁵]

67. However, the parties' past practices⁹⁶ have not been to employ these standards. Further, EAI does not require all attachers to adhere to

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Harrelson Reply Report ¶¶ 68-71.

⁹³ Buie Decl. Resp. Ex. 4 at 20, 25-28, 55-56, 63, 65, 70-82; Lovell Decl. Res. Ex. 13 at ¶ 4.

⁹⁴ Gould Reply Decl. ¶¶ 15-16; Allen Reply Decl. ¶¶ 13-14; Hooks Reply Decl. ¶ 14-15; Billingsley ¶ 17.

⁹⁵ Response ¶ 415; Arnett Decl. Resp. Ex. 1 at ¶ 32.

⁹⁶ Gould Reply Decl. ¶¶ 29-30; Dunlap Reply Decl. ¶¶ 4-5; Allen Reply Decl. ¶¶ 18-19; Hooks Reply Decl. ¶¶ 18-19.

these standards.⁹⁷ Finally, EAI's own construction crews are not following these standards in the field.⁹⁸ Considering that EAI only seeks to enforce these standards with respect to Complainants' facilities, and does not consider compliance to be critical to the safety other attachers' attachments, Complainants do not believe the heightened standards are for reasons of safety, reliability or generally applicable engineering purposes. [EAI cannot stipulate to this statement as described above.]

b) EAI

68. The NESC code provides for exceptions to the separation rules at the pole and at mid-span where certain criteria are met.⁹⁹ EAI's standards, however, do not employ the exceptions to the general NESC rule provisions for separations.¹⁰⁰ The NESC also requires at least four bonds per mile of utility plant,¹⁰¹ and requires that a load study be conducted before "piggy-backing" on an existing anchor.¹⁰² [Complainants cannot stipulate to these

⁹⁷ Gould Reply Decl. ¶¶ 31-39; Harrelson Report p. 15.

⁹⁸ Harrelson Reply Report ¶¶ 68-71; Harrelson Report pp. 23-24; Dunlap Reply Decl. ¶ 5; Gould Reply Decl. ¶ 18.

⁹⁹ See e.g., Resp. ¶¶ 491-502, NESC Rule 235, Table 235-5; Buie Decl. Resp. Ex. 70-82..

¹⁰⁰ Resp. at ¶¶ 491-502; Buie Decl. Resp. Ex. 4 at ¶¶ 25-28, 63, 70-82, 84; Complaint Ex. 2A-2D at attachments 1-4.

¹⁰¹ Resp. at ¶ 101; Buie Decl. Resp. Ex. 4 at ¶ 56; Dagenhart Decl. Resp. Ex. 6 at ¶ 10.

¹⁰² Resp. at ¶ 105; Buie, Decl. Resp. Ex. 4 at ¶ 61; Complaint at ¶ 269; NESC Rule 264(B) ("Guys shall be designed to withstand the loads in Rule 252 multiplied by the overload factors in Table 253-1 without exceeding the permitted load. The permitted load shall be equal to the strength multiplied by the strength factors in table 261-1A. For guy wires conforming to ASTM standards, the minimum breaking strength value therein defined shall be the rated breaking strength in this code.").

facts. The first sentence improperly characterizes the nature of exceptions to NESC general rules. Exceptions have the full force and effect of the rules themselves.¹⁰³ Regarding the second sentence, as discussed in Complainants' disputed facts section above, the parties' historical practices do not support EAI's statement that it does not employ the exceptions. In the third sentence, EAI has misstated the NESC's requirements. The NESC's bonding requirements are more complex than the summary here stated. In addition, the NESC Rule 264 does not require a load study. It merely requires that guys are not overloaded.^{104]}

69. The engineering drawings and language of the pole attachment agreements were included in the contracts at the time they were executed or assigned and have not been amended or updated.¹⁰⁵ [It is Complainants position that the agreements were effectively amended through the parties' field practices.^{106]}

70. EAI has made a conscious decision, based on safety, reliability, and other business considerations, to establish engineering standards that track the NESC in most regards but that do not employ exceptions that would be inappropriate in light of local conditions, costly, time-consuming, or

¹⁰³ NESC Rule 015 (2002 edition) Intent paragraph D; Reply V.B.2.; Harrelson Reply Report. ¶ 52; Reply Sec. VI.

¹⁰⁴ See NESC Rule 264.

¹⁰⁵ Bettis Decl. Resp. Ex. 3 at ¶ 8; Neumeier Decl. Resp. Ex. 14 at ¶ 8; Welch Decl. Resp. Ex. 19 at ¶ 6; Willems Decl. Resp. Ex. 20 at ¶ 8.

¹⁰⁶ Harrelson Report p. 24; Billingsley Reply Decl. ¶ 40; Hooks Reply Decl. ¶ 24; Allen Reply Decl. ¶ 19 (See Reply Sec. III.D.2)

impractical, or inappropriate to employ in the field for communications contractors.¹⁰⁷ It would not have cost anything additional for the Cable Operators to have installed their facilities with the contract standards in the first instance, nor would it have delayed access.¹⁰⁸ In the case of bonding and anchoring, EAI's standards are more expeditious and practical than requiring the Cable Operators to calculate and maintain the NESC bond density, or requiring them to perform a load analysis to determine if piggy-backing on an anchor is feasible.¹⁰⁹ [Complainants cannot stipulate to these facts because they disagree that EAI's standards are based in safety, reliability and generally applicable engineering purposes. (See preceding subsection). In addition Complainants find no basis in fact for EAI's contention that complying with EAI's standards would be easier or less costly. Finally, Complainants disagree that EAI's standards are consistent with industry standards.¹¹⁰]

3. Stipulated law

71. It is reasonable for a utility to require attaching entities to attach and maintain their facilities in a safe manner. The Arkansas Code states that "construction of telecommunications lines and facilities by a telecommunications company or cooperative as a minimum requirement shall

¹⁰⁷ Buie Decl. Resp. Ex. 4 at ¶¶ 19-29, 25-28, 55-56, 63, 70-82, 84; Dagenhart Decl. Resp. Ex. 6 at ¶¶ 11-18.

¹⁰⁸ Resp. ¶ 86.

¹⁰⁹ Dagenhart Decl. Resp. Ex. 6 at ¶ 16-18; Tabor Decl. Resp. Ex. 17 at ¶ 13; Resp. n. 127; Buie Decl. Resp. Ex. 4 at ¶¶ 55-56, 61-64; *Newport News* at ¶ 15.

¹¹⁰ See Harrelson Report pp. 4-6 and Harrelson Reply Report ¶¶ 68-71.

comply with the standards of the National Electric [sic] Safety Code in effect at the time of construction..."¹¹¹

72. The pole attachment agreements between the parties specify that the Cable Operators attachments "shall, at all times, as a minimum, be in conformance with the National Electrical Safety Code..." and that wires and appliances "shall be erected and maintained in accordance with the specifications of the Electric Company" including the engineering drawings identified as Drawings 1, 2, 3, and 4 attached to the agreements.¹¹²

73. EAI is not required to adhere solely to the NESC for its engineering specifications, and standards that exceed the NESC are not *per se* unreasonable.¹¹³

74. Arkansas law, the pole attachment agreements, industry practice and the FCC acknowledge that the NESC is relevant but not controlling, and that EAI is permitted to impose engineering standards that differ from the NESC to meet its reasonable judgment regarding the safety and reliability of its plant and the business needs of the utility.¹¹⁴

¹¹¹ Ark. Code Ann. § 23-17-236.

¹¹² Comp. Ex. 2A-2D, at Art. 2.3; Buie Decl. Resp. Ex. 4 at ¶¶ 23, 24.

¹¹³ Dagenhart Decl. Resp. Ex. 6 at ¶¶ 12-14.

¹¹⁴ Ark. Code Ann. § 23-2-304 (2004); Dagenhart Decl. Resp. Ex. 6 at ¶¶ 11-14 ("Utilities, therefore, as a practice, design facilities on poles, including initial clearances for lines and communications cables, using standards which exceed the NESC..."); Buie Decl. Resp. Ex 4 at ¶¶ 25-28, 63, 84; Jackson Decl. Resp. Ex. 10 at ¶¶ 5-7 (survey of practices of SEE member utilities); *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange*

4. Disputed law

a) Complainants

75. It is unjust and unreasonable for EAI to impose engineering standards that are for reasons other than safety, reliability and generally applicable engineering purposes.¹¹⁵ [EAI cannot stipulate to this. As discussed above, criteria for engineering standards are not limited to the Section 224(f) criteria related to denials of access.¹¹⁶ Moreover, its standards are also justified on safety and reliability grounds.¹¹⁷]

76. It is unjust and unreasonable for EAI's heightened standards, which it has not enforced, either with respect to Complainants, other attachers or itself, to become an issue only now that USS is conducting an audit. Considering that EAI has operated for years with out applying the heightened standards and considering that EAI's construction department continues to disregard these standards in the field, it is unjust and unreasonable for EAI to hold Complainants to strict compliance with the Pole Attachment Agreements where EAI's past practice has not previously enforced strict compliance.¹¹⁸ [EAI cannot stipulate to these statements for

Carriers and Commercial Mobile Radio Service Providers (Local Competition Order) 14 FCC Rcd. 18049 at ¶¶ 1143-1150 (1999).

¹¹⁵ 47 U.S.C. § 224.

¹¹⁶ See Section IV.B.2, *supra*.

¹¹⁷ Buie Decl. Resp. Ex. 4 at 20, 25-28, 55-56, 63, 65, 70-82; Dagenhart Decl. Resp. Ex. 6 at ¶¶ 11-14.

¹¹⁸ See *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colo.*, 15 FCC Rcd 11450 (Cab. Serv. Bur. 2000), *aff'd on reconsideration*, 17 FCC Rcd 6268 (2002), *aff'd sub nom. Public Serv. Co. of Colo. v. FCC*, 328 F.3d 675 (D.C. Cir. 2003)

the reasons cited above with respect to the inapplicability of the precedent cited and EAI's position that it has always required adherence to the contract standard.^{119]}

77. Similarly, it is unjust and unreasonable for EAI to penalize Complainants for conduct consistent with the parties prior practices.¹²⁰ [EAI cannot stipulate to this for the reasons stated above.]

78. It is unjust and unreasonable for EAI to impose the heightened standards on Complainants because it does not impose them on other attachers, including itself.¹²¹ Because the standards are only applied to one set of attachers, but not all, they cannot be for reasons of safety, reliability or generally applicable engineering standards.¹²² [EAI cannot stipulate to this for the reasons stated above. EAI applies the same standards to attachers and itself.¹²³ Engineering standards need not be limited to the criteria cited, as explained elsewhere and below.^{124]}

b) EAI

79. The Cable Operators have failed to establish a *prima facie* case as to the unreasonableness of EAI's engineering standards.¹²⁵ They have not alleged that they could not have met the standards when installing and

¹¹⁹ See Section IV.A.4, *supra*.

¹²⁰

¹²¹ See Record cites set forth at Complainants' Disputed fact section at V.D.

¹²² 47 U.S.C. § 224.

¹²³ Bettis Decl. Resp. Ex. 3 at ¶¶ 8; Harrell Decl. Resp. Ex. 8 at ¶¶ 7, 11-15; Kelley Decl. Resp. Ex. 11 at ¶¶ 3-5; Willems Decl. Resp. Ex. 10 at ¶ 8; Neumeier Decl. Resp. Ex. 14 at ¶ 8; Lovell Decl. Resp. Ex. 13 at ¶ 4.

¹²⁴ See Section IV.B.3, *supra*.

¹²⁵ Resp. at ¶¶ 85-86.

maintaining their plant, or that to do so would have been prohibitive from a cost or time perspective. Rather, they simply assert that some of EAI's standards "exceed" the NESC and are accordingly unreasonable. This is legally and factually incorrect.¹²⁶ [Complainants do not stipulate to this. Complainants dispute that their attachments were in violation at the time of installation. Further, Complainants do not contend that they could not have installed attachments in compliance or that to do so would be prohibitively expensive. Complainants' position is that now, after other attachers have made subsequent attachments and created violations, it is difficult or impossible and prohibitively expensive to make retroactively the changes EAI requests and that it is unjust and unreasonable to place this burden on Complainants alone.¹²⁷]

80. Conversely, EAI has illustrated that its standards could have readily been met, and were designed to minimize cost and time while maximizing worker and public safety and protecting the integrity of the plant.¹²⁸ The FCC and industry practice recognize the NESC as only one of many considerations that a utility employs when establishing engineering criteria.¹²⁹ [Complainants cannot stipulate to this because it disputes that

¹²⁶ *Id.*; *See also*, Dagenhart Decl. Resp. Ex. 6 at ¶¶ 12-16.

¹²⁷ Harrelson Reply Decl. ¶¶ 26-32;

¹²⁸ *See, e.g.*, Buie Decl. Resp. Ex. 4 at ¶¶ 25-28, 63, 84; Dagenhart Decl. Resp. Ex. 6 at ¶ 11-18.

¹²⁹ Dagenhart Decl. Resp. Ex. 6 at ¶ 12; Resp. ¶¶ 90-113; Buie Decl. Resp. Ex. 4 at ¶¶ 20, 25-28, 63-65, 70-82, 84; Ark. Code Ann. § 23-2-304 (2004);

EAI designed, installed and maintained its facilities and its joint use program in accordance with its heightened standards.^{130]}

81. The NESC is not intended to function as a design standard.¹³¹ The FCC has previously declined to mandate the NESC as a maximum standard, finding that a national standard would inappropriately foreclose necessary local considerations.¹³² Adherence to the NESC is not proof against potential liability.¹³³ [Complainants cannot stipulate to this because it does not believe it is relevant. Complainants are not asking the FCC to set the NESC as a maximum standard. Whether NESC compliance is a shield against liability is not relevant to Complainants claims that EAI has implemented and applied its standards in a manner that is unjust, unreasonable and non-discriminatory].

82. A significant number of other qualified and experienced agencies also have the authority to regulate this aspect of the utility. For example, FERC, OSHA, and state Public Service Commissions address electric safety,

Jackson Decl. Resp. Ex. 10 at ¶¶ 5-7; Letter from UTC/EEI to W. Darling, Resp. Ex. 81.

¹³⁰ Harrelson Decl. pp. 23-24; Dunlap Reply Decl. ¶ 5; Gould Reply Decl. ¶ 18.

¹³¹ NESC at 010; Buie Decl. Resp. Ex. 4 at ¶ 22; Dagenhart Decl. Resp. Ex. 6 at ¶ 11.

¹³² *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 1143,1150 (1999); Resp. ¶ 83, 84; *See also*, Dagenhart Decl. Resp. Ex. 6 at ¶¶ 11-14.

¹³³ UTC/EEI Letter Resp. Ex. 81 at p. 2, *citing Rich Mountain Elec. Coop. v. Revels*, 311 Ark. 1, 841 S.W. 2d 151 (1992); *Yampa Valley Elec. V. Telecky*, 862, P.2d 252 (Colo. 1993).

reliability and engineering issues on a day-to-day basis.¹³⁴ These agencies recognize the expertise of the utility in managing its own plant.¹³⁵ The FCC should also give substantial weight to the expertise of the utility in assessing its safety, engineering, and reliability needs.¹³⁶ [Complainants cannot stipulate to this paragraph because it is irrelevant. Complainants do not seek to have the FCC set or determine engineering standards. Complainants only ask that the Commission exercise its authority as set forth in Section 224 to ensure that EAI's standards are set and applied for reasons of safety, reliability and generally applicable engineering purposes and not for unjust, unreasonable and discriminatory reasons or for revenue generating purposes.]

83. Complainants have failed to illustrate that these standards are technically infeasible, unnecessary for safety purposes, or otherwise prohibitive from a cost or time perspective. EAI has fully justified its standards, in that they comport with the basic requirements of the NESC, are in conformance with industry norms, and represent a permissible assessment of EAI's safety and reliability needs for its plant and the public, and the liability that EAI has chosen to undertake with respect to its

¹³⁴ Strickland Decl. Resp. Ex. 16 at ¶ 5; Letter from UTC/EEI to W. Darling, Resp. Ex. 81.

¹³⁵ Id.; Buie Decl. Resp. Ex. 4 at ¶¶ 19, 20.

¹³⁶ Society of Cable Telecommunications Engineers, Inc., Recommended Practices for Coaxial Cable Construction and Testing (2d Ed.), and Recommended Practices for Optical Fiber Construction and Testing (3d Ed.), Arnett Decl. Resp. Ex. 1, Attachments L, M; Letter from UTC/EEI to W. Darling, Resp. Ex. 81.

facilities.¹³⁷ EAI is not required to limit itself to the NESC in establishing its engineering criteria.¹³⁸ [Complainants cannot stipulate to this paragraph because nothing in Section 224 or pole attachment precedent requires it to show that EAI's technically infeasible, unnecessary for safety purposes, or otherwise prohibitive from a cost or time perspective. To the contrary, it is EAI that is prohibited from imposing requirements other than those for reasons of safety, reliability and generally applicable engineering purposes.¹³⁹]

84. Moreover, if necessary, these agencies with substantial expertise in the regulation of electric utility practices have the authority to address the engineering, reliability, safety and business issues related to the standards for a utility's regulated plant.¹⁴⁰ In light of their authority and expertise in

¹³⁷ Resp. at ¶¶ 87, 88; UTC/EEI Letter Resp. Ex. 81 at pp. 4-5; Strickland Decl. Resp. Ex. 16 at ¶ 5; Jackson Decl. Resp. Ex. 10 at ¶ 5-7; Buie Decl. Resp. Ex. 4 at ¶¶ 20, 25-28, 63, 84, 70-82; Dagenhart Decl. Resp. Ex. 6 at ¶¶ 11-18 ("Electric and communications facilities are generally designed using standards which exceed the basic requirements set forth in the NESC. This is done so that at any given time throughout the life of the facility it will remain safe, reliable and compliant with the NESC despite changes or fluctuations caused by weather or forces beyond the control of the utility.")

¹³⁸ UTC/EEI Letter Resp. Ex. 81 at p. 2, n. 3 (citing *Rich Mountain Elec. Cooperative v. Revels*, 311 Ark. 1, 841 S.W.2d 141 (1992); *Yampa Valley Elec. Ass'n v. Telecky*, 862 P.2d 252 (Colo. 1993)); *Local Competition Order* at ¶ 1145 ("Indeed, utilities routinely impose requirements more stringent than those prescribed by the NESC and other industry codes."); Dagenhart Decl. Resp. Ex. 6 at ¶¶ 11-18.

¹³⁹ 47 U.S.C. § 224.

¹⁴⁰ UTC/EEI Letter, Resp. Ex. 81 at p. 4; Ark. Code Ann. § 23-2-304; Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues, Order Adopting Policy Statement on Pole Attachments, Docket No. 03-M-0432 (NY PSC Aug. 6, 2004); Strickland Decl. Resp. Ex. 16.

these matters, and the judgment of the utility in establishing these standards, the FCC should find that EAI's engineering criteria under the Pole Attachment Contracts constitute reasonable conditions within the meaning of the Pole Attachments Act. [Complainants cannot stipulate to this paragraph for the reasons set forth in its responses to the immediately preceding paragraphs.]

C. How should the grandfathering and exception provisions of the NESC be applied, if at all?

1. Stipulated Facts

85. Complainants cannot stipulate to any facts for the reasons set forth in subsection 2(a) below.

2. Disputed Facts

a) Cable Operators

86. Complainants do not believe that this question is appropriate for the Commission's consideration. Complainants have not requested that the FCC determine how the grandfathering and exception provisions of the NESC are to be applied. In fact, Complainants have neither briefed this issue nor taken a position one way or the other on this issue in the pleadings. The question Complainants asks and has briefed is whether EAI's refusal to apply the grandfathering provisions and exceptions to the rules is just, reasonable, non-discriminatory and if it is for reasons of safety, reliability or generally applicable engineering purposes. Complainants address that question in Sections IV.D. and IV.E., below.